2013 IL App (2d) 110542-U
No. 2-11-0542
Order filed January 22, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-926
MARNI YANG,	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

ORDER

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

¶ 1 *Held*: The trial court did not err in its evidentiary rulings. The prosecution did not commit reversible error in its closing argument. Affirmed.

¶ 2 Following a jury trial, defendant, Marni Yang, was convicted of two counts of premeditated first degree murder for the deaths of Rhoni Reuter and her unborn child (720 ILCS 5/9-1(a), 9-1.2(a), 9-1(b)(11) (West 2007)). The trial court imposed concurrent natural life sentences. On appeal, defendant argues that the: (1) trial court erred in allowing into evidence recorded conversations obtained pursuant to statutes for eavesdropping devices (725 ILCS 5/108A (West 2007)) and

electronic surveillance (725 ILCS 5/108B (West 2007)); (2) trial court erred in excluding evidence of a third-party's motive and in allowing evidence of defendant's motive; (3) trial court erred in refusing to tender a jury instruction regarding accomplice witnesses; (4) trial court erred in allowing inflammatory life and death testimony and crime scene photos; and (5) prosecution committed reversible error in its closing argument. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This case concerns the murder of Rhoni Reuter and her unborn child. Reuter was more than seven months pregnant at the time of the shooting. Shaun Gayle, a former Chicago Bears football player, had been in a 17-year relationship with Reuter and was the father of her unborn child. Prior to the trial, the court assessed the admissibility of third-party motive evidence against Gayle. The proposed evidence concerned previous pregnancies between Gayle and the victim that ended in abortion. However, the court ultimately ruled that this evidence was too remote and speculative to be relevant. The prevailing theory of the case was that defendant, who was also romantically involved with Gayle, was motivated by jealousy to shoot and kill Reuter.

¶ 5 Defendant and Gayle met at a Chicago Bears convention in 2005, where defendant was working security. Defendant and Gayle's relationship started on professional terms; defendant, who was also a realtor, worked with Gayle. However, soon their relationship became sexual. According to defendant's friends and family, defendant's attachment to Gayle was unhealthy.

¶ 6 Co-worker Maggie Zimmer testified that defendant talked about Gayle on a daily basis, that defendant confided in her that she had obtained access to Gayle's e-mail account, and that defendant often complained about the e-mails from other women, critiquing style and content.

¶ 7 Friend Julie Fields testified that defendant told her that she repeatedly accessed Gayle's e-mail account. While accessing Gayle's e-mail, defendant learned that Gayle was taking Reuter on a trip to Europe. Defendant found the reservations in Gayle's e-mail account, called the hotel, and canceled the reservations. Additionally, defendant learned that Gayle was seeing a Polish woman named Monika Kurowska. Defendant bragged that she posed as Kurowska, imitating Kurowska's style of broken English. Under Kurowska's name, she sent e-mails to threaten or deter other women involved with Gayle. Defendant asked Fields to call the fiancé of another woman Gayle was seeing, but Fields declined.

¶ 8 Defendant's 20-year-old daughter, Emily Yang, also testified that her mother had gotten into Gayle's e-mail account and learned that he was dating other women. Defendant told Emily that she sent letters to the other women Gayle was dating. In these letters, defendant again imitated Kurowska's style of broken English.

¶ 9 Gayle testified that, at some point, defendant became frustrated with the non-exclusive nature of their relationship. Defendant told Gayle that she would be taking a vacation to a particular resort in Puerto Vallarta, Mexico. This was the same resort to which Gayle had planned to take Reuter. Gayle did not know whether defendant actually made the trip or not; he did not see her there. On cross-examination, Gayle clarified that the vacation was part of a promotional trip advertised through Apple Vacations, and other Bears players went as well. In the summer of 2007, Gayle told defendant that he was going to be a father.

¶ 10 Defendant's close friend of 20 years, Christi Paschen, also testified that defendant spoke with her about accessing Gayle's e-mail. Based on the e-mails, defendant made up nicknames for the women Gayle was seeing: "Miss Macy's," "Miss Japan," and "Miss California," for example. In the

summer of 2007, defendant told Paschen that she was frustrated that Gayle continued to see other women and that she was going to kill him. Regarding Reuter's pregnancy, defendant told Paschen that Gayle was incapable of being a parent and did not deserve a child. However, at some point, defendant began to contemplate killing Reuter instead of Gayle. Paschen urged her to "leave it alone." Defendant then told Paschen that she had once gone to Reuter's apartment building with a gun, but she changed her mind about shooting Reuter at the last minute and left. Paschen again told defendant not to do it, that she would be caught, and that her arrest would only hurt her family.

¶ 11 Paschen testified that, on October 3, 2007, the night before the murder, defendant slept over at her house. Defendant asked Paschen to read tarot cards to determine whether she would be successful in killing Reuter. Defendant drew a card that indicated achievement of a goal. Defendant told Paschen that, if she killed Reuter, she would call Paschen on the phone and deliver a coded message. The code would be asking Paschen to dinner. Paschen did not take defendant's plan seriously enough to call the police. When Paschen woke up the next morning, defendant was gone.

¶ 12 That morning, on October 4, 2007, at approximately 7:50 a.m., one of Reuter's neighbors saw a person wearing dark clothes, face paint, and a wig head up the apartment staircase. Then, Reuter's neighbors heard a short scream, loud banging sounds, and a crash. However, neighbors did not report hearing what they would describe as gunshots, indicating use of a silencer. One neighbor called the police. Another neighbor saw who he described as a thin, African American teenage boy, possibly wearing a wig, run across the parking lot and leave in a small black car. A nearby security camera recorded a black Volkswagen heading toward Reuter's residence at 7:04 a.m. and leaving the area at 7:55 a.m.

¶ 13 Paramedics found Reuter lying face-down on her kitchen floor. They could not revive her. She had been shot seven times. Reuter sustained a single bullet wound to the back of the head, which was the immediate cause of death. Two bullets struck Reuter's abdomen, killing the child. Reuter also had two bullet wounds in her arms, which, according to the pathologist, occurred when Reuter tried unsuccessfully to shield her abdomen. Spent 9-mm casings, as well as five unfired rounds, surrounded the body.

¶ 14 Inside Reuter's purse, the police found a typed, unsigned letter warning "what your boyfriend [Gayle] is doing." The author of the letter claimed to have "found out everything," and stated that Gayle was sleeping with women in destinations all over the world, that he kept these relationships going for years, and that he is "giving disese [*sic*] to every other women [*sic*]." Toward the end of the letter, the author referenced Reuter, suggesting that Gayle "told everyone *** you had to get abortion [*sic*]." The author listed the names and phone numbers of 16 other women, including defendant, and told the reader to contact these women "so you can see for yourself."

¶ 15 Police spoke with Gayle after shooting. At Gayle's home, police saw a book underneath some paperwork called "Cool Baby Names." Gayle explained that he had bought the book in London that summer. Gayle did not have an alibi until after 9 a.m. the morning of the shooting, when he left his home to get a haircut. However, his physical build could not have been mistaken for that of the perpetrator leaving the scene. Police also investigated Kurwoska, due to the style of the letter in Reuter's purse and because she, too, had demonstrated unusual emotional behavior in her relationship with Gayle. However, Kurwoska had an alibi. Finally, after hearing from Julie Fields a few days after the murder, police began to focus their attention on defendant. Gayle

cooperated with police and agreed to wear a body wire to record his conversations with defendant, but defendant said nothing incriminating to Gayle.

¶ 16 That October, police searched defendant's trash on several occasions. They found a broken computer hard drive and bank statements. The bank statements showed that defendant had paid for dozens of online background checks for personal information regarding the other women with whom Gayle was involved. While performing a search of defendant's home, the police found several typed but unsent letters, nearly identical to the one found in Reuter's purse. Defendant's home office contained several address labels and return labels. The address labels matched the addresses received from the background check company. The return labels bore Gayle's name and address.

¶ 17 Police learned that defendant had access to guns. In October 2005, defendant was detained by the Transportation Security Administration at the Fort Lauderdale International Airport for attempting to transport without paperwork two handguns and roughly 200 rounds of ammunition. The guns had belonged to defendant's uncle, who had recently passed. Defendant filled out the necessary paperwork and transported the items to Chicago. Defendant's former boyfriend, Cook County Sheriff's Deputy Salvador Devira, testified that one of the transported handguns was a black 9-mm Beretta, with fake pearl grips. Defendant practiced shooting her 9-mm gun at a shooting range. Devira testified that he accompanied defendant to the shooting range. Shooting range owner, Don Mastriani, recalled that defendant used a Beretta 9-mm handgun. Mastriani changed the grips for defendant, providing easier handling. Defendant purchased 9-mm ammunition from Mastriani.

¶ 18 Police obtained evidence showing that defendant made or attempted to make a silencer. August 2007 bank statements showed that defendant used her debit card to purchase a two-volume set entitled, "How to Make Disposable Silencers." Defendant paid for overnight shipping of the

books. She signed for the package at her home the following morning. The next day, she went to Home Depot and purchased the items needed to build a disposable silencer. These items included a keyhole saw, a hacksaw, rubber cups, duct tape, electrical tape, a marker, a file, a folding razor, piping, and a one-inch metal hose clamp. Two hours after she checked out, she returned to Home Depot and purchased more supplies and larger piping. When the police searched defendant's home pursuant to a warrant, they found materials consistent with the manufacture of a disposable silencer.

¶ 19 Police also executed a search warrant on defendant's work computer. There, they found that defendant had obtained driving directions from her work to Reuter's home address.

¶ 20 Finally, police obtained documentation that defendant rented a black Volkswagon the day before the murder, the type of car recorded leaving the scene of the crime. Defendant initially was given a "velvet blue" car, which she returned. The rental company picked defendant up at Paschen's apartment. Although defendant paid for the black car in cash, defendant's driver's license was recorded as security for the transaction. Additionally, the rental company required a credit card, and defendant provided a card jointly held by her father and her ex-boyfriend, Devira. Devira testified that he did not use the credit card to rent a car. The distance traveled on the black car was 40.2 miles. This is the distance from the rental company, back to Paschen's house (where defendant spent the night), to Reuter's apartment, and back to the rental company.

¶ 21 On February 18, 2009, 18 months after Reuter's murder, the police obtained an Article 108B order (725 ILCS 5/108B (West 2007)), judicially authorizing a tap on defendant's phone. Shortly thereafter, police called in Paschen for questioning. Paschen did not call the police prior to the murders because she did not believe defendant was capable of going through with the act. After the

murders, she was afraid. Paschen agreed to cooperate with the investigation. Paschen testified that she was never promised anything in exchange for her cooperation.

¶ 22 Paschen told police that, around 9 a.m. on the morning of the murder, defendant called her at work using a number that she did not recognize. Defendant asked, "Do you want to go to dinner?," which was the coded message defendant had devised the night before to disclose that she had killed Reuter. This telephone conversation had been recorded pursuant to Paschen's company's policy. Police obtained the recording, and it was admitted into evidence. Paschen had previously told defendant that it was her company's policy to record phone calls.

¶ 23 Defendant went to Paschen's apartment the evening of the murder and told her about it. Defendant told Paschen that she wore a disguise, that she grabbed a medical alert bracelet from Reuter before leaving the scene, and that she planned to place the gun in a bucket of cement and bury it. Defendant then suggested that they go for a drive. The two drove around Arlington Heights to discard items from the murder in various Dumpsters. Paschen saw defendant throw out several items, including packaging for gun grips, a black wig, and clothes. Paschen also saw defendant bury a small object outside of a banquet hall.

¶ 24 Based on Paschen's information, the police went to the banquet hall where defendant buried the small object. After digging in the area, they found a distinctive, pearl, medical-alert bracelet that said "pregnant." Witnesses identified the bracelet as belonging to Reuter.

¶ 25 Paschen agreed to wear a body wire in future conversations with defendant. On February 28, 2009, the police obtained an Article 108A (725 ILCS 5/108A (West 2007)) judicial authorization for the body wire. Also on February 28, 2009, in a recorded phone conversation obtained two weeks prior pursuant to Article 108B of the Code (725 ILCS 5/108B (West 2007)), Paschen called

defendant, reporting that the police questioned her. Paschen then stated that she was tired and was going to bed. Paschen called the next evening, March 1, 2009, and the two arranged to meet in person at a Denny's restaurant.

¶ 26 At the restaurant, Paschen's body wire recorded the conversation. Defendant stated that, while "the police were still running in circles looking for [a] teenager," she had encased the gun in a bucket of cement, threw the bucket in a Chicago Dumpster, and was confident that the bucket was now buried under "a year-and-a-half's worth of Chicago garbage." Defendant assured Paschen that the police were nowhere near resolving the crime and that, if the police "had their ducks in a row, *** they'd be at [defendant's] doorstep with a pair of handcuffs."

¶ 27 The next day, defendant again met Paschen at Denny's. Paschen again wore a body wire to record the conversation, wherein defendant described the murder in a hushed voice:

> "[Defendant]: I stood outside on the carpet in the hallway. *** She opened up the door to the apartment. Okay? I was in. I had a wig on. I had dark sunglasses this big covering my face.
>
> Paschen: Wow.
>
> [Defendant]: I had a hoodie on. Okay? I had dark makeup on my face and I had gloves on. Okay? When... when... when... she opened up the door, that's when I, that's when I brought out the gun. And when she saw it she started screaming, and I just let her have it. I just let her have it. I think I maybe took two big steps into the kitchen to make sure she... okay? And then I left.
>
> ***
>
> Paschen: Well, okay. You said it was dark.

[Defendant]: M[hm], it was dark. I didn't touch anything. I took maybe two steps and I took...

Paschen: What did you see?

[Defendant]: All I saw was... everything was in shadows, the kitchen was dark. Okay? In fact, it was so dark I wasn't even positive that I was making straight shots. Okay? Didn't even, didn't... she, she opened up the door and all she saw was a dark-skinned person with sunglasses holding a gun like this. With a hoodie on, okay? And... she started screaming. I took the first shot. I remember screaming. [Be]cause at that point I realized we are now at the point of no return. Okay? Any thoughts that we had about turning back—we got to finish this now. And I just started emptying the clip. Um... She went, cause [sic] she had already started to come out of the apartment, she went backwards into the kitchen. Fell against the counter, fell against a counter, with the floor and it was all in shadows. It was all in shadows.

Paschen: Well how was it laid out?

[Defendant]: The kitchen?

Paschen: Yea.

[Defendant]: I never got far in there enough to see.

Paschen: Okay.

[Defendant]: I never got far in there enough to see. Okay? Um... and don't forget, I also, I had the dark glasses on. Um... I took maybe one or two steps into the kitchen to finish the job. All she was doing was screaming until she went down, and then when she went down she took her foot and she took one good kick at me, got me in the shin. Uh, it

> was like weak by that time so 'Uh,' like that. And that was it. I just, I, took one last shot, in the head—finished her off. And I took off. Oh, I closed—I had gloves on—closed the door behind me. Her leg was sticking out into the hallway; I had to kick it inside. Then I slammed the door; took off. That was it."

Defendant also discussed renting the black get-away car, which she thought would be inconspicuous. She found or stole a set of license plates for the car. Finally, defendant discussed her cash purchase of a disposable cellular phone, which she used to call Paschen the morning of the murder to ask if she would like to "go to dinner." Defendant had unsuccessfully tried prior to trial to suppress these recordings, for reasons not raised again on appeal.

¶ 28 The defense cast doubt on Paschen's credibility. Paschen testified in cross-examination that, in 1976, the Army recruited her as a psychic. Paschen claimed to be the sole survivor of her "final mission" in the Middle East, and, afterwards, the military erased some of her memories. Detective Charles Schletz testified that Paschen told him that she fabricated her military experience to enhance her resume as a psychic. The parties stipulated that the federal government had no records of Paschen's military service. Evidence of Paschen's falsified military service, combined with a photo of defendant that police had shown to the witness who had seen the perpetrator flee the scene and an unidentified latent fingerprint from Reuter's doorknob, constituted defendant's entire case-in-chief.

¶ 29 During closing argument, the State reviewed the evidence against defendant. However, the State made a single statement characterizing defendant's courtroom demeanor as "dispassionate" and "cold," which it concedes on appeal to be error. Defendant argued that the police investigation was

not thorough and centered too quickly on defendant without giving adequate consideration to other possible suspects.

¶ 30 The defense requested an accomplice-witness jury instruction as to Paschen, but the trial court refused. The jury convicted defendant and the court sentenced defendant as stated. This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 On appeal, defendant challenges the introduction of several recorded conversations, the exclusion of third-party motive evidence against Gayle, the trial court's refusal to tender an accomplice-witness jury instruction as to Paschen, and various "inflammatory" crime scene photos, testimony, and argument. For the reasons that follow, we reject each of these arguments.

¶ 33 A. Suppression of Recorded Conversations

¶ 34 Defendant argues that the trial court should have suppressed three recorded conversations: (1) the Article 108A body wire with Paschen wherein defendant described the murders; (2) the Article 108B phone tap wherein Paschen and defendant arranged to meet in person; and (3) the "day-of" phone conversation, which was recorded according to Paschen's company's policy. Where, as here, a defendant does not challenge a trial court's factual findings, we review *de novo* the trial court's decision to deny a motion to suppress. *People v. Close*, 238 Ill. 2d 497, 504 (2010).

¶ 35 1. Paschen Body Wire Pursuant to Article 108A

¶ 36 Defendant argues that the trial court should have suppressed the March 1 and March 2, 2009, person-to-person conversations between defendant and Paschen at the Denny's restaurant. In these conversations, defendant described how she murdered the victims and how she disposed of the

murder weapon. These conversations were obtained pursuant to the February 28, 2009, Article 108A order authorizing the use of a body wire.

¶ 37 Defendant sets forth three bases for suppression: (1) the State violated Article 108A-3(4) (725 ILCS 5/108A-3(4) (West 2007)) when it failed to inform the issuing judge of February 18, 2009, Article 108B applications for a phone tap; (2) the record does not show whether the issuing judge complied with the post-overhear, anti-tampering requirements in Article 108A-7(b) (725 ILCS 5/108A-7(b) (West 2007)); and (3) State prosecutors violated the "no-contact" rule of professional conduct (1990 RPC, Rule 4.2 (eff. Aug. 1, 1990)) when they enabled Paschen, a consenting informant, to speak with defendant, who was represented by counsel.

¶ 38 Defendant did not present these bases to the trial court at the pretrial suppression hearing. Arguments not raised before the trial court are forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve a claim for appeal, a party must raise a specific objection *and* articulate the claim in a written posttrial motion stating the grounds therefore). Had defendant raised these issues below, the court and parties could have inquired further to determine, for example, whether the issuing judge knew of the previous applications for an eavesdropping device and whether the issuing judge complied with post-overhear requirements.

¶ 39 This court may consider forfeited issues under the plain-error doctrine. Plain error occurs where: (1) a clear or obvious error, however serious, occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear and obvious error occurred, and that error was so serious that, regardless of the closeness of the evidence, it affected the fairness of the trial and the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Of course, where there is no error, there cannot be plain error. *People v.*

Nicholas, 218 Ill. 2d 104, 121 (2005). Here, for the reasons that follow, there was no error, let alone plain error. Therefore, defendant's forfeiture must be enforced.[1]

¶ 40 i. Body Wire: Article 108A-3(4)

¶ 41 As to defendant's first point, Article 108A-3(4) states that each application seeking judicial approval of an eavesdropping device shall include:

> "[A] statement of the existence of all previous applications known to the individual making the application which have been made to any judge requesting permission to use an eavesdropping device involving the same persons in the present application, and the action taken by the judge on the previous applications." (Emphasis added.) 725 ILCS 5/108A-3(4) (West 2008).

Defendant complains that the State's February 28, 2009, *Article 108A* application to use an eavesdropping device (a body wire) did not include a statement informing the court of its earlier, February 18, 2009, *Article 108B* application to intercept a private communication (a phone tap). Defendant notes that the requirements under Article 108A, Judicial Supervision of the Use of Eavesdropping Devices, are to be strictly construed. *People v. Bockman*, 328 Ill. App. 3d 384, 388-

[1] In her reply brief, defendant argues for the first time that trial counsel was ineffective for failing to raise the relevant objections at trial. To the extent that this argument is a response to the State's forfeiture arguments, we consider it. See *People v. George*, 140 Ill. App. 3d 1001, 1005 (1986). Therefore, we deny the State's motion to strike portions of the reply brief discussing ineffective assistance. However, because, as will be discussed, no error occurred, defendant's ineffective assistance claim fails.

89 (2002) (application did not contain facts sufficient to establish a reasonable belief that the sought-after conversations concerning the felony would occur during the recorded conversation).

¶ 42 Here, it cannot be said that Article 108A-3(4) unambiguously requires the disclosure of prior Article 108B applications, something defendant would need to establish to show a lack of strict compliance. *Cf. Bockman*, 328 Ill. App. 3d at 390-91 (where it was apparent on the face of the application that it did not comply with mandatory (unambiguous) statutory requirements, there could be no good-faith exception to the exclusion). The State refers to the idea that an Article 108A application would disclose prior Article 108B applications as a "cross-reference" disclosure. Article 108A, which is entitled "Judicial Supervision of the Use of Eavesdropping devices," applies "where any one party to a conversation to be monitored *** has consented to such monitoring." 725 ILCS 5/108A-1 (West 2008). In contrast, Article 108B, which is entitled "Electronic Criminal Surveillance," states that "Electronic Communication" means any transfer of sounds "where the sending *and* receiving parties intend the electronic communication to be private." 725 ILCS 5/108B-1(g-1) (West 2008). The case law treats recorded conversations under Articles 108A and 108B differently. *People v. Gariano*, 366 Ill. App. 3d 379, 385 (2006) (instant messages were not an Article 108B private electronic communication because one party was an undercover officer who did not intend for the conversation to remain private; the dissent implicitly conceded that the communications were not covered under 108B but argued that the State should have sought authorization under 108A). Although the 108A and 108B applications involved the same persons (Paschen and defendant), the requirement in section 108A-3(4) that all "prior applications" involving the same persons be disclosed does not unambiguously state that prior 108B applications be disclosed. Defendant cites no authority to the contrary.

¶ 43 In any case, the record indicates that the State satisfied the purpose of disclosing prior applications, which is to guard against forum shopping amongst issuing judges. See *United States v. Bellosi*, 501 F. 2d 833, 838 (D.C. Cir. 1974) (discussing a similar requirement in the federal wiretapping statute). At the suppression hearing, an officer involved in the application testified that the issuing judge was aware that a different judge had earlier authorized an Article 108B phone tap. When asked how the issuing judge was made aware, the officer answered, "I probably told him." On redirect, he answered more definitively, "I did tell [the issuing judge] that we had an active wire going and so far it had not yielded any results." He substantiated his recall of the conversation by providing details, such as where he, the judge, and other persons were standing when he made the statement. Thus, even if Article 108A-3(4) required "cross-reference" disclosure, there are *no* grounds by which to infer that the State received the instant Article 108A authorization to eavesdrop with a body wire only after misleading the issuing judge about the status of its prior 108B phone tap requests.

¶ 44 ii. Body Wire: Article 108A-7(b)

As to defendant's second point, Article 108A-7(b) states that:

> "Immediately after the expiration of the period of the order *** all such recordings shall be made available to the judge issuing the order ***.
>
> The judge shall listen to the tapes, determine if the conversations thereon are within his order ***, and make a record of such determination to be retained with the tapes.
>
> The recordings shall be sealed under the instructions of the judge and custody shall be where he orders. Such recordings will not be destroyed ***.
>
> ***." 725 ILCS 5/108A-7(b) (West 2008).

Defendant complains that the record does not show one way or the other whether the trial court complied with Article 108A-7(b). Defendant relies upon *United States v. Ojeda Rios*, 495 U.S. 257, 264 (1990), which held that the government's delay in sealing wiretap records warranted exclusion unless it provided a satisfactory explanation to excuse the delay.

¶ 45 Accepting for argument's sake that the federal provision at issue in *Ojeda* is similar enough to Article 108A-7(b) to hold persuasive value, *Ojeda* is, nevertheless, inapposite. In *Ojeda*, the government admitted delay in sealing the tapes. Here, there is no evidence on record to suggest that there was any delay in sealing the tapes. Defendant had and lost the opportunity to question the issuing judge or anyone else involved. The record is silent on the issue. Without a record to support defendant's claim, we must presume that the trial court complied with Article 108A-7(b), preserving the recordings' integrity. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 46 iii. Body Wire: Rule 4.2

¶ 47 As to defendant's third point, the "no contact" rule of professional conduct states that:

> "During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law." 1990 RPC Rule 4.2 (eff. Aug. 1, 1990).

The 2010 version of Rule 4.2 is substantively identical to the 1990 version, with only slight rewording. 2010 RPC Rule 4.2 (eff. Jan. 1, 2010). The comments therein explain that the Rule is meant to guard against interference with the client-lawyer relationship, but it is not meant to interfere with "investigative activities of lawyers representing governmental entities, directly or through

investigative agents." 2010 RPC Rule 4.2 (comments 1 and 5). Moreover, a court may authorize communication that would otherwise be prohibited under the Rule. 2010 RPC Rule 4.2 (comment 6). Attorney disciplinary matters generally are not within the purview of the appellate courts. *People v. Bickerstaff*, 403 Ill. App. 3d 347, 353 (2010). Still, in the proper case, a court *may* invoke its supervisory power and impose a sanction for violation of the no-contact rule. *United States v. Springer*, 460 F. 2d 1344, 1354 (7th Cir. 1972) (court refused to invoke its supervisory power to suppress a written confession obtained in violation of the no-contact rule because the accused had voluntarily elected to speak outside the presence of counsel in hopes of lenient treatment).

¶ 48 Defendant argues that Rule 4.2 applies here because the assistant state's attorney was involved in the Article 108A application for a body wire, even though she knew defendant had, by that point, obtained an attorney. *People v. Santiago*, 236 Ill. 2d 417 (2010), and *People v. White*, 209 Ill. App. 3d 844 (1991), upon which defendant relies, do not support defendant's position. *Santiago* does not involve Article 108A.

¶ 49 In *White*, the defendant sought to suppress recorded conversations obtained pursuant to Article 108A, arguing that the state's attorney violated the "no contact" rule of professional conduct. *White*, 209 Ill. App. 3d at 869-70. Defendant's attorney had informed detectives that he represented defendant and that he would like to be contacted prior to any questioning. This information allegedly was conveyed to the state's attorney, who authorized detectives to apply for an Article 108A eavesdropping order. *Id*.

¶ 50 The *White* court held that the rule had not been violated because the state's attorney did not communicate on the subject of the representation. For that to have been the case, the government investigator or informant would need to act as the "alter ego" of the prosecutor. *Id*. at 873-74.

Where an informant acts as an alter ego of the prosecutor, there is a danger that the defendant would be tricked into giving the case away, as an unknowing subject to the prosecutor's superior skill and acumen. *Id*. at 875. Government investigators and informants act as the alter ego of the prosecutor if they act at the behest of and with specific instruction from the prosecutor as to *how* to elicit incriminating statements from the defendant. *Id*. at 873-74. A general instruction to induce the defendant to discuss the crime does not make the informant an alter ego of the prosecutor. *Id*. at 873. When not acting as the alter ego of the prosecutor, government investigators may engage in legitimate investigative techniques, including the use of an informant eavesdropper. *Id*. at 874. Given its finding, the *White* court did not discuss whether an Article 108A eavesdropping order constituted an "authoriz[ation] by law"exception to the no-contact rule. *Id*. at 876. Likewise, the court did not reach the question of whether suppression was the proper remedy. *Id*.

¶ 51 Here, as in *White*, defendant cannot establish that the informant, Paschen, acted as the prosecutor's alter ego. Defendant points to testimony that the police, not the state's attorney, asked Paschen to speak with defendant. Defendant speculates that the State must have promised Paschen lenience in exchange for her cooperation, thereby encouraging Paschen to act as its alter ego. However, the record is devoid of any indication of this. To the contrary, Paschen testified that she was not promised anything in exchange for her cooperation. Defendant has not shown a Rule 4.2. violation, nor has she shown that suppression would have been the proper remedy.

¶ 52 2. Phone Tap Pursuant to Article 108B

¶ 53 Next, defendant argues that the trial court should have suppressed the February 28, March 1, and March 2, 2009, phone conversations between defendant and Paschen, obtained pursuant to Article 108B (725 ILCS 5/108B (West 2007)). The only recorded phone conversations submitted

into evidence that were obtained pursuant to Article 108B concerned defendant and Paschen's plan to meet in person at Denny's.

¶ 54 Defendant argues that these statements should be suppressed because the State violated Article 108B-4(a)(5) when it failed to inform the issuing judge of its Article 108A applications for a body wire on informant Gayle, back in 2007 at the very early stages of the investigation. Article 108B-4(5) states that:

> "A statement of the facts concerning all previous applications known to the applicant made to any court for authorization to intercept a private communication involving *** any person whose communication is to be intercepted, and the action taken by the court on each application." 725 ILCS 5/108B-4(a)(5) (West 2008).

As determined above, the disclosure requirements of Articles 108B and 108A do not unambiguously cross-reference one another. Again, Article 108B covers the transfer of sounds "where the sending *and* receiving parties intend the electronic communication to be private." 725 ILCS 5/108B-1(g-1) (West 2008). Article 108B-4(a)(5) requires that previous applications to intercept a "private communication" be disclosed. The Article 108A body wire to which informant Gayle consented would not qualify as a "private communication." *Gariano*, 366 Ill. App. 3d at 385. Therefore, the State did not fail to strictly comply with Article 108B-4(a)(5).

¶ 55 Regardless, the admission of the March 2009 phone conversations could never amount to reversible error. The recordings provided minimal contextual evidence. They merely showed that Paschen and defendant agreed to meet at Denny's—a fact neither party disputes.

¶ 56 3. October 2007 "Day-Of" Work Phone Recording

¶ 57 Finally, defendant argues that the trial court should have suppressed the October 4, 2007, "day-of" phone conversation, where defendant called Paschen at work and asked, "Do you want to go to dinner?" Defendant prearranged this phrase as a code to disclose that she had killed Reuter. This call was recorded pursuant to the company practice of Paschen's employer. Defendant argues that this conversation was recorded in violation of the criminal eavesdropping statute, which provides that a person commits the offense of eavesdropping when he or she "uses an eavesdropping device to hear or record all or any part of any conversation unless he [or she] does so *** with the consent of all of the parties to such conversation." 720 ILCS 5/14-2(a)(1) (West 2007).

¶ 58 The criminal eavesdropping statute does not prohibit the recording of a phone conversation between two parties who consent to be recorded. *People v. Ceja*, 204 Ill. 2d 332, 349-50 (2003). Consent may be established where a party acts as though he or she knows of, and assents to, encroachments on the routine expectation that conversations are private. *Id*. (defendants in separate jail cells consented to being recorded because they were made aware, through verbal warning and posted signs, that their conversations could be heard through an audio monitoring system).

¶ 59 Here, the surrounding circumstances demonstrate that defendant knew of and assented to an encroachment on the routine expectation that conversations are private. Defendant prearranged to use the phrase "Do you want to go to dinner?" as a code to disclose that she had killed Reuter. The use of a coded language shows an awareness that the conversation could be overheard. See, *e.g.*, *United States v. Sababu*, 891 F. 2d 1308, 1329 (7th Cir. 1989). Moreover, Paschen testified that she told defendant that the conversation could be overheard: "I told [defendant] pretty much right after I started [working] there that it was company policy to tape any and all phone conversations and read any and all e-mails that were sent back and forth." Paschen told defendant this "so that if

[defendant] decided to send [her] something personal, *** she would know other people might read it." Defendant assumed the risk that the conversation could be recorded. There was no violation of the criminal eavesdropping statute.

¶ 60 Because there was no violation of the criminal eavesdropping statute, we need not consider defendant's argument that no exception applies to an (alleged) violation of the criminal eavesdropping statute. See 720 ILCS 5/14-3(j) (West 2007) (exception for recording of telephone conversations for business training purposes). Again, consent brings the recorded conversation outside the confines of the statute. *Ceja*, 204 Ill. 2d at 346-49.

¶ 61 To whatever extent defendant is arguing that section 14-3(j) precludes corporations from sharing recorded conversations with investigatory authorities or from being used in judicial proceedings, her argument fails. Section 14-3(j) refers to recordings obtained while the business entity is "*engaged in* marketing or opinion research" or "*engaged in* telephone solicitation." 720 ILCS 5/14-3(j) (West 2007) (emphases added). Business entities that use telephone monitoring or recording devices pursuant to this section must provide employees with notice that such recording is taking place. *Id.* Here, Paschen's employer provided notice that the conversations would be recorded. And, the phone call at issue did not even begin as a "market research" or "solicitation" call as those terms are defined by the statute. *Id.* Rather, defendant called Paschen, not the other way around, and the conversation maintained its character as a non-business, personal call throughout its duration. To exclude the recording of the phone call here would require us to conclude that no conversation that was initially recorded because a business entity generally recorded all conversations occurring on its business lines could *ever* be subpoenaed; the exception cannot possibly be that broad.

¶ 62 In sum, the admission of several recorded conversations did not constitute error, let alone plain error.

¶ 63 B. Exclusion of Third-Party Motive Evidence

¶ 64 Defendant argues that the trial court erred in excluding motive evidence against Shaun Gayle. Particularly, defendant argues that the trial court erred in excluding evidence that: (1) Gayle had twice previously caused Reuter to become pregnant (once in 2005 and once prior to that), that these pregnancies ended in abortion, and that, as to the first pregnancy, Gayle's lawyer or representative had informed Reuter that, if she carried the baby to term, Gayle would sue her for extortion and she would never see her child; (2) Gayle "pushed" Reuter one month prior to the shooting; and (3) Gayle had financial difficulties (in that he didn't have sufficient funds for a down payment or to pay a builder for a new property).[2]

¶ 65 A defendant may offer evidence tending to show that the crime was committed by someone else. *People v. Whalen*, 158 Ill. 2d 415, 430 (1994). The admission of third-party motive evidence does *not* require the customary balancing probative value against prejudicial effect. *People v. Cruz*, 162 Ill. 2d 314, 350 (1994). Instead, the only question is whether the evidence has significant probative value. *Id.* The evidence has probative value if it raises a reasonable doubt as to the defendant's culpability. Graham, Handbook of Illinois Evidence, § 404.5 (10th ed. 2010). The evidence should be excluded as irrelevant, however, if it is too remote or speculative. *People v. Beaman*, 229 Ill. 2d 56, 75 (2008). Evidence is remote if it is removed in time. *People v. Dukett*,

[2] Defendant also complains that she was not allowed to introduce evidence of Gayle's "womanizing" lifestyle. However, the jury *was* made aware that Gayle had many ongoing relationships with females.

56 Ill. 2d 432, 450 (1974). Evidence is speculative where it has no nexus to the crime. *People v. Kirchner*, 194 Ill. 2d 502, 540 (2001). Often, the combination of evidence must be considered to determine if it or any one piece has probative value or if, on the contrary, it is too remote or speculative. See, *e.g.*, *Beaman*, 229 Ill. 2d at 78 ("the combination of the undisclosed [*Brady*] evidence with disclosed [but excluded] evidence tending to establish Doe as a viable alternative suspect cannot be considered remote or speculative"). We will review the trial court's evidentiary rulings for an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 66 We focus on whether the trial court abused its discretion when it determined that the third-party motive evidence was too remote or speculative. *Dukett* is instructive. There, the court affirmed the exclusion of evidence that, several months prior to the shooting murder, a third party had fired a blank cartridge at the victim in an angry display. *Dukett*, 56 Ill. 2d at 448. The *Dukett* court noted that there was no evidence directly connecting the third party to the crime at issue. *Id*. at 449.

¶ 67 Here, the evidence suggesting that Gayle had, two years prior to the murder, pressured Reuter to have two abortions for financial reasons and, one month prior to the murder, "pushed" Reuter, is not flattering. However, we cannot say the trial court abused its discretion in determining that the evidence was too speculative to support a motive for murder. The trial court has the discretion to exclude evidence that would pose undue risk of harassment or confusion of the issues. See, *e.g.*, *People v. Garcia*, 2012 IL App (2d) 100656 ¶ 22. The jump from a "push" to seven unrelenting shots, two into the abdomen of a pregnant woman and one into her skull, could reasonably be considered speculative where no evidence connected Gayle to the crime. Therefore, the trial court did not abuse its discretion in excluding the evidence.

¶ 68 We understand defendant's point, which she refers to as a "reverse Rule 404(b),"[3] that evidence of Gayle's prior bad acts cannot be prejudicial to Gayle, because he is not a party to the case in which the evidence is offered. *People v. Turner*, 373 Ill. App. 3d 121, 129-30 (2007). However, we need not consider this point where defendant cannot clear the first hurdle of relevance.

¶ 69 Next, defendant, citing *People v. Beaman*, 229 Ill. 2d 56 (2008) (postconviction proceeding), complains that it was unfair to allow the State to admit evidence of defendant's motive in the form of anonymous letters to her romantic rivals but not evidence of Gayle's motive. In *Beaman*, the court held that the State violated defendant's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose material information about an alternative suspect. *Beaman*, 229 Ill. 2d at 59. The court stated that "the combination of the undisclosed evidence with the disclosed evidence tending to establish Doe as a viable alternate suspect cannot be considered remote or speculative, particularly in light of the State's [weak] evidence against petitioner." *Id*. at 78.

¶ 70 In comparing this case to *Beaman*, defendant conflates two separate, though similar, lines of inquiry: the *Brady* test and the guideline for admission of third-party motive evidence. Each of these lines of inquiry was necessary in the *Beaman* analysis, but only the latter is at issue here. Again, reversing the exclusion of third-party motive evidence requires a showing that the trial court abused its discretion when it determined that the evidence was too remote or speculative. *Id*. at 75. In any event, *Beaman* does *not* stand for the proposition that the admittance of motive evidence against a defendant entitles the defendant to present competing motive evidence against a third party.

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[1] Illinois Rules of Evidence 404(b) states that evidence of prior bad acts are not admissible to show propensity, but may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011).

While a comparison of the evidence against the defendant and the evidence against a third party may aid in a pre-admission determination of *whether* each respective piece of evidence is relevant (see *Id*. at 77, discussing *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006)), the rule remains that only relevant evidence is admissible.

¶ 71 C. Jury Instruction

¶ 72 Defendant asserts that the trial court erred when it refused defendant's request to tender, with respect to Paschen, Illinois Pattern Jury Instruction-Criminal No. 3.17 (4th ed. 2000). That instruction states: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." IPI Criminal 4th No. 3.17. Defendant is entitled to an accomplice witness instruction if the witness could have been indicted as a principal or under a theory of accountability, or if the witness admits presence at the scene of the crime. *People v. Gwinn*, 366 Ill. App. 3d 501, 520 (2006). A person is legally accountable for another's conduct when, "either *before or during* the commission of the offense, and with the intent to promote or facilitate such commission he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense." (Emphasis added.) 720 ILCS 5/5-2 (West 2007). Whether sufficient evidence exists to support the giving of a jury instruction is a question of law subject to *de novo* review. *People v. Washington*, 2012 IL App. 110283 ¶ 19.

¶ 73 Here, Paschen could not be indicted as a principal or as an accomplice, nor was she present at the scene of the crime. Paschen was not the principal; she did not shoot Reuter. Paschen was not accountable; she did not aid or abet the crime *before or during* its commission. Before the crime,

Paschen listened to defendant talk about killing Reuter and read her tarot cards, but did not believe that defendant would follow through with her actions. While Paschen's act of driving around with defendant *after* the murder to dispose of evidence constitutes a separate offense, that act does not make Paschen an accomplice to the murder charge. See *People v. Phillips*, 2012 IL App (1st) 101923, ¶ 18.

¶ 74 Defendant points to the fact that, in its February 2009 Article 108B phone tap application, the State referred to Paschen as an "involved individual." However, whether the State considered Paschen a suspect in its 2009 application is unrelated to whether evidence during the 2011 trial supported a finding that Paschen was an accomplice. The case law cited by defendant on this point is inapposite. See *People v. Wheeler*, 401 Ill. App. 3d 304, 313-14 (2010) (counsel ineffective for failing to tender accomplice-witness instruction); *People v. Campbell*, 275 Ill. App. 3d 993, 997 (1995) (same). The trial court did not err in refusing to tender instruction No. 3.17.

¶ 75 D. Allegedly Inflammatory Evidence and Argument

¶ 76 Defendant complains the following evidence was unduly prejudicial: (1) crime scene and autopsy photos, particularly because (a) the photos and video of the crime scene capture various baby supplies aimed at inflaming the jurors' emotions, and (b) the photos were unduly gruesome where there was no question as to the cause of death; (2) the ultrasound photo of the unborn child; (3) testimony from Reuter's brother regarding Reuter's life; and (4) the State's rebuttal closing argument wherein it stated that "defendant *** has been *** [d]ispassionately sitting here, coldly, breathing in the air that Rhoni Reuter's dead child will never get to breathe."

¶ 77 Defendant did not submit into the record on appeal the crime-scene video. Therefore, that issue is forfeited pursuant to *Foutch* (99 Ill. 2d at 391-92). At oral argument, the State clarified that

the only ultrasound photo to which the jury was privy was the one captured in the video. Therefore, the defendant's argument concerning the ultrasound is also forfeited. As to the crime-scene and autopsy photographs, the trial court has discretion to admit crime-scene photographs if they are probative of any fact in issue, even if the photographs are gruesome. *People v. Lindgren*, 79 Ill. 2d 129, 143-44 (1980). Crime-scene photographs are probative if they reveal the cause of death, the amount of force used in the murder, the condition of the premises, or if they corroborate the testimony of the witnesses. *Id*. Courts have repeatedly deemed admissible gruesome photographs where those photographs accurately depict that a violent crime occurred. See, *e.g.*, *People v. Bunch*, 159 Ill. App. 3d 494, 511 (1987). In other words, there is no requirement that the State sanitize the true facts of the case.

¶ 78 Here, defendant does not allege that these photos are anything other than an accurate depiction of the violent crime. The court minimized any potential for prejudice by suggesting that the prosecutor turn the autopsy photos face down when they were not being used. Moreover, to the extent that the pictures captured any baby supplies, they are probative of defendant's motive and corroborate witness testimony on that issue. Defendant entered Reuter's home and fired shots directly at her abdomen. To bar evidence of baby supplies in the home would be to present a limited picture of the animus that motivated defendant.

¶ 79 As to Reuter's brother's testimony, we note that courts condemn the introduction of otherwise irrelevant information about a crime victim's personal traits or family relationships during the guilt phase of the trial. *People v. Hope*, 116 Ill. 2d 265, 275 (1986). Where testimony concerning the surviving family is not elicited incidentally, but, rather, is presented in a manner as to cause the jury to think it is material, its admission may constitute reversible error. *Id*. Here,

however, the evidence was not introduced so as to cause the jury to think it was material to defendant's guilt. In the complained-of testimony, Reuter's brother stated that the two had grown up together, that he lived relatively nearby in Wisconsin, that he saw her twice last year, and that he talked to her on the phone, *i.e.*, he knew her well enough to identify her life picture. Defendant did not object to these comments at trial. Defendant did object to the brother's comment that Reuter once told him on the phone that the baby was kicking. However, defendant did not object at trial that the statement was potentially inflammatory. When called to the bench, defendant's attorney only complained that the comment was hearsay. Again, arguments not raised before the trial court are forfeited. *Enoch*, 122 Ill. 2d at 186.

¶ 80 Finally, we find, and the State concedes, that the closing comments concerning defendant's "cold" courtroom demeanor were improper. Though prosecutors have wide latitude in closing argument, comments and inferences made must be based on record evidence. See, *e.g.*, *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). A defendant's demeanor, except for when testifying, is not "evidence," and, therefore, the prosecutor cannot comment on it. *People v. Foss*, 201 Ill. App. 3d 91, 94 (1990). However, we cannot find that these comments amount to reversible error. The evidence against defendant was overwhelming. See *Foss*, 201 Ill. App. 3d at 94 (comment regarding courtroom demeanor was harmless error where evidence against the defendant was overwhelming). The impact of this isolated comment amongst two weeks of testimony was minimal, and the comment does not constitute reversible error.

¶ 81 III. CONCLUSION

¶ 82 For the foregoing reasons, we affirm the trial court's judgment.

¶ 83 Affirmed.